National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 11, 1996

TO: Elizabeth Kinney, Regional Director, Region 13

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Chicago Beer Distributing Co., Case 13-CA-34526

506-4033-4100

This Section 8(a)(3) case was submitted for advice on whether the Employer lawfully refused to hire a nonunit casual employee into a permanent unit employee position unless the employee and Union agreed to an extension of the employee's probationary period in that unit position.

Miles had been a unit employee from April 1992 to September 1994. Miles returned to the Employer in January 1996 as a nonunit casual employee working as needed on a day-to-day basis. Thereafter, when a permanent unit position became available, Miles informed the Employer that he was interested in that position. The Employer offered Miles the unit position contingent upon Miles' signing an agreement which would have extended the contractual probationary period from 60 days to almost a year and one-half. The Employer explained that an extended probationary period was necessary because it was concerned that Miles' work performance would deteriorate after he became a permanent employee.[(1)] The Employer advised Miles to talk to the Union about the proposed probationary period extension agreement and to return the agreement signed by a Union business agent.

When Miles presented the proposed agreement to a Union business agent, the agent advised Miles not to sign the agreement and instead to file the instant Section 8(a)(3) charge. In subsequent discussions between the Employer and the Union, the Employer made clear that it would not hire Miles without the express consent of both Miles and the Union to an extension of his probationary period. Neither Miles nor the Union agreed to the extension.

We conclude, in agreement with the Region, that the Region should dismiss this charge, absent withdrawal, because the Employer's refusal to hire Miles as a permanent unit employee was for good cause, and not in retaliation against any protected refusal by Miles to waive his rights under the parties' bargaining agreement.

In this regard, we consider Columbia Corrugated Container[(2)]

clearly distinguishable. In that case, an employee was the only unit employee who refused to waive his bargaining agreement right to share work time equally pending a layoff. Thereafter, the employer discharged and then refused to rehire the employee allegedly because he had failed to report for 48 hours. The ALJ, adopted by the Board, found this reason pretextual, and found that the Employer had acted instead because of the employee's refusal to waive his contractual right to share the work. Since this conduct encompassed the protected activity of insisting upon rights under a bargaining agreement, the Board found the discharge and refusal to hire unlawful.

Unlike the circumstances in Columbia Corrugated Container, the Employer here was dissatisfied with Miles' performance, lawfully could have refused to hire Miles for good cause, and instead proposed an extended probationary period. The Employer's refusal to hire Miles thus was caused by Miles' prior work performance, and was not caused by Miles' refusal to agree to a longer probationary period.[(3)]

B.J.K.

[1] **According to the Employer, its concern over Miles' work performance as a unit employee dated to 1993, when Miles had taken days off from work which led to a hostile exchange. The Employer acknowledged that Miles' performance as a casual employee was of better quality.**

[2] **Columbia Corrugated Container Corp., 226 NLRB 147 (1976).**

[3] **We would not argue that Miles had no right to the contractual probationary period under Holloway Ready Mix Co., Inc., 305 NLRB 753 (1991), where the Board found that the employer lawfully solicited waivers of the probationary period from probationary employees. In that case, however, the applicable contract clause expressly provided that the employer and union could agree to an extended probationary period with the written consent of the employee.**